

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
SAN FRANCISCO BRANCH OFFICE

ENCINO HOSPITAL MEDICAL CENTER —PRIME

and

Case No. 31-CA-066945

SEIU UNITED HEALTHCARE WORKERS-WEST

*Juan Ochea-Diaz, Esq., and Simone Pang, Esq.,
for the General Counsel.
Jonathan A. Siegel, Esq. (Jackson Lewis LLP),
of Newport Beach, California, for Respondent.
Monica Guizar, Esq. (Weinberg, Roger, &
Rosenfeld), Los Angeles, California, for the Union.*

DECISION

Statement of the Case

Gerald A. Wacknov, Administrative Law Judge. Pursuant to notice a hearing in this matter was held before me in Los Angeles, California on April 30 and May 1, 2012. The charge in the captioned matter was filed by SEIU United Healthcare Workers-West (Union) on October 14, 2011. Thereafter, on February 28, 2012, the Regional Director for Region 31 of the National Labor Relations Board (Board) issued a consolidated complaint and notice of hearing alleging violations by Encino Hospital Medical Center—Prime (Respondent) of Section 8(a)(1) and (3) of the National Labor Relations Act, as amended (Act). The Respondent, in its answer to the complaint, duly filed, denies that it has violated the Act as alleged.

The parties were afforded a full opportunity to be heard, to call, examine, and cross-examine witnesses, and to introduce relevant evidence. Since the close of the hearing, briefs have been received from counsel for the Acting General Counsel (General Counsel) and counsel for the Respondent. Upon the entire record, and based upon my observation of the witnesses and consideration of the briefs submitted, I make the following:

Findings of Fact

I. Jurisdiction

5 The Respondent is a corporation operating an acute care hospital in Encino, California. In the course and conduct of its business operations the Respondent annually derives gross revenues in excess of \$250,000 and annually receives and purchases at its Loveland, Colorado facility, good materials and services valued in excess of \$5000
10 directly from points outside the State of California. It is admitted and I find that the Respondent is, and at all material times has been, an employer within the meaning of Section 2(2), (6) and (7) of the Act, and a health care institution within the meaning of Section 2(14) of the Act.

II. Alleged Unfair Labor Practices

A. Issues

20 The principal issue in this proceeding is whether the Respondent has terminated an employee in violation of Section 8(a)(1) and (3) of the Act.

B. Background, Facts and Analysis

25 The Respondent operates a hospital. Two unions represent the hospital employees, the Union herein and SEIU 121, which union represents the Respondent's registered nurses. There are a total of approximately 400 employees who work at the hospital, about 80 percent of whom are represented by the two unions. The Respondent and Union have entered into at least two prior collective-bargaining agreements, the last
30 agreement extending for over 4 years, from January 1, 2007 through March 31, 2011.¹

 Barbara Back began working for the Respondent on July 5 as human resources manager. Among her other duties and responsibilities, Back deals with the two unions representing the hospital employees; she handles grievances and participates in
35 negotiations for both union contracts.

 Patricia Aguirre worked for the Respondent for some 13 years as a Lab Technician/Phlebotomist from 1998 to 2011. She was terminated by Back on
40 October 11. She was a shop steward and a member of the Union's bargaining team. As a shop steward she handled grievances. As a member of the Union's bargaining team she attended bargaining meetings with Respondent's representatives including HR Representative Barbara Back and Respondent's CEO Bob Bills.

45 At the time of Aguirre's discharge, negotiations for a successor contract were ongoing and the relationship between the Respondent and Union was contentious, although discussions at the bargaining table were apparently less adversarial.

 Prime Healthcare Foundation (Prime) owns and operates the Respondent. The Union, among other things, was attempting to block the sale of a different hospital, Victor

¹ All dates or time periods hereinafter are within 2011 unless otherwise specified.

Valley Community Hospital (Victor Valley), to Prime. On August 17, Aguirre spoke on behalf of the Union's Political Department as a patient advocate at a hearing before the Attorney General of California, attended by between 100 to 200 individuals, regarding the adverse changes at the Respondent's hospital after it had been purchased by Prime.

5 She spoke about the negative effects on patients, the employees and the community as a result of the acquisition, implying that the same negative effects would befall Victor Valley.²

10 Aguirre, as well as other employees, were featured on many union handbills, posted or otherwise disseminated at the Respondent's facility, supporting the Union's positions against Respondent's practices and policies.

15 The sale of Victor Valley community Hospital to Prime was not approved. The record evidence herein does not show why the license was denied. Richard Ruppert, a business agent and negotiator for the Union testified that at a negotiating session on September 22, CEO Bob Bills mentioned the hearing before the Attorney General, stating that employees had testified against the acquisition of Victor Valley. He said that the license had been denied, and that in his opinion "he thought that was unfortunate and very sad." He also said that the Union had "conducted ourselves professionally in

20 our bargaining and had non-adversarial type of conversations, though we disagreed in bargaining." Aguirre, who also attended the session as a bargaining committee member, testified that Bills said it was the Union's fault that Prime lost the sale of Victor Valley, and that as a result Victor Valley may have to go bankrupt.

25 It appears that the Union was accusing Prime of engaging in some type of illegal conduct, and on September 19, 2011 the Respondent distributed a handbill to its employees entitled "The SEIU is DESTROYING Your Jobs." The handbill goes on to state:

30 Since its purchase Prime Healthcare has invested millions of dollars in much needed capital equipment at Encino Hospital. But, instead of working with hospital management, the SEIU has reacted by doing everything possible to destroy the Hospital. It looks like they want to ensure that Encino closes.

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* * *

40 How do you gain anything if the SEIU is successful in destroying the company that you work for? SEIU leaders are fond of talking about how you are the union. If that's true, then it's time to say ENOUGH! Tell the SEIU leadership to start focusing on bargaining and stop using lies that threaten to put Encino Hospital out of business.

45 The incident resulting in Aguirre's termination involves a grievance matter over the termination/resignation of former employee Iris Arse. Aguirre had assisted Arse, a union member and friend, in a grievance matter that resulted in an agreement between Arse and the Respondent's former HR manager, Gail Brow, that Arse would resign

² The record reflects that 47 other individuals also spoke at the hearing for and against the acquisition. It appears that no supervisors or managers of the Respondent attended this hearing and the record herein does not reflect whether Bills or Back were aware of Aguirre's participation at the hearing.

rather than be terminated for some unexplained infraction; further, it was agreed that if Arse chose to apply for unemployment the Respondent would not contest her claim to receive unemployment benefits.

5 Arse's claim for unemployment was denied; the reason for the denial is not contained in the record and there is no showing or contention that the Respondent contested the claim. Arse appealed the denial of her claim, and a hearing on the appeal was scheduled for September 27. Arse advised Aguirre of this, and asked if Aguirre would assist her and take her to the hearing, as Arse did not drive. Aguirre agreed.

10 On September 23, Aguirre went to the Respondent's HR department to attempt to elicit some information from HR personnel regarding the unemployment appeal hearing. Rather than ask HR Manager Back whether any representative of the Respondent would be attending or representing the Respondent at the hearing, she first
15 approached Christina Armenia, human resources assistant, who occupied a cubicle in the office. Armenia testified that Aguirre walked over to her desk, "lowered her tone and asked if I knew about a hearing regarding Iris Arse, which would take place on September 27. " Armenia replied that she didn't know anything about it. Aguirre asked if she knew whether Carmen Soto, the human resources coordinator, would be attending
20 the hearing. Armenia told her that she could ask Soto who was in the adjoining cubicle. Aguirre went to Soto's cubicle, and Armenia heard her tell Soto, "Barbara [Back] told me that you or Bob [Bills] would be attending the hearing." Soto told Aguirre that she was unaware of the hearing, and advised her to speak with Back herself.³

25 Soto testified that she overheard Aguirre whispering to Armenia but could not make out what Aguirre was saying. She did hear Armenia tell Aguirre to speak with Soto. Then Aguirre approached Soto and asked, in a normal tone, "Do you know who will be attending Iris Arse's hearing?" Soto said she was not aware of such a hearing, and Aguirre replied, "Barbara [Back] told me that either you or Bob [Bills] would be
30 attending." Soto, who had recently returned from a 3 month maternity leave, told Aguirre that she was not sure.

Soto asked Armenia about Aguirre's whispered conversation with her. It concerned her that Aguirre, by whispering to Armenia, seemed to be attempting to
35 obtain information in a secretive fashion, as there simply was no reason to whisper. Soto also was concerned that in her absence perhaps she had been assigned by Back to attend a hearing that she knew nothing about. Later in the day Soto approached Back, explained what had happened and what Aguirre had said to her and had whispered to Armenia, and asked whether she was supposed to attend any type of hearing. Back
40 replied that she and Aguirre had never had the conversation that Aguirre had related to Soto.⁴

Upon receiving Soto's report of the incident and, upon further questioning, learning exactly what had happened, Back spoke with Armenia and with Laboratory
45 Director Erlinda Roxas, Aguirre's supervisor. She also reviewed Aguirre's personnel file. Back, who had never had such a conversation with Aguirre, and had never been

³ I credit the testimony of Armenia, who appeared to be a credible witness and had no reason to fabricate her testimony.

⁴ I credit the testimony of Soto, who appeared to be a credible witness and had no reason to fabricate her testimony.

contacted by Aguirre about the matter, concluded from the foregoing reports and circumstances that Aguirre was lying and was using Back as leverage in attempting to manipulate Back's subordinates into eliciting information.

5 The review of Aguirre's personnel file disclosed the following:

- October 13, 2010 written warning and three day suspension for attempting to take a cell-phone photo of a patient in the geropsychology unit.

10 • May 12, 2011 written warning for two separate infractions:

March 17, 2011 warning for compromising the quality of patient care by mislabeling specimens;

15 April 5, 2011 warning for compromising the quality of patient care by mislabeling a urine sample specimen with another patient's name.

20 Under the heading "Further Action to be Taken" the Performance Improvement Form states: Failure to meet standards will result in further disciplinary action up to and including termination.

- May 12, 2011 verbal and written warning for two, separate infractions:

25 May 3, 2011 warning for barging in and interrupting a May 3, 2011 meeting to which she had not been invited between Respondent's managers and a union representative;

30 May 5, 2011 warning for interfering with the security guard and nursing supervisor in the performance of their jobs.

Under the heading "Further Action to be Taken" the Performance Improvement Form states: Failure to comply with standards of conduct and/or interfere with other employees from performing their work will result in further disciplinary action up to and including termination.

- May 12, 2011 written warning for bossing around a mentally challenged employee on May 5, 2011 during a Biohazard Medical Waste Inspection and throwing an open bag of biohazard waste materials at him while he was performing his duties.

40 Under the heading "Further Action to be Taken" the Performance Improvement Form states: Failure to comply with patient and employee safety standards in the workplace and to continue to interfere with other employees from performing their work will result in further disciplinary action, up to and including termination.

45 None of the foregoing warnings had been issued to Aguirre during the tenure of HR Manager Back, who did not begin working for the Respondent until July 2011. Back testified that any inappropriate behavior that is unlawful or violates protocol, policy, procedure, or is otherwise impermissible, is considered collectively in the application of the Respondent's progressive discipline system; progressive discipline does not begin

anew for each distinct or unrelated type of infraction.⁵ The Union has never argued that each succeeding step in the progressive discipline system may only be imposed for the same or similar misconduct. Suspension and final warning are the same thing in terms of severity, so that if a person has received a suspension it is the same as having received a final warning.

Upon a review of all the circumstances, including Aguirre's personnel file, Back determined that Aguirre's conduct in falsifying a conversation and using her name as leverage to gain information was dishonest and manipulative, and recommended that Aguirre should be discharged. Back testified as follows:

I talked with Erlinda [Roxas] and reviewed the personnel file. My main concern was that Pat's [Aguirre] communication with the HR team, not only the whispering, but the communication in using my name as leverage to get confidential information. That was a concern for me because, number one, it's dishonest. Number two, it's trying to manipulate the girls to try and gain information that she easily could have come to ask me for.⁶

On October 11⁷ after receiving authorization to terminate Aguirre, Back, with Laboratory Director Erlinda Roxas as a witness, summoned Aguirre, accompanied by Union Representative Ruppert, into the office and confronted her with the reports of Armenia and Soto. Aguirre denied that any such conversations had taken place and repeatedly accused the two HR representatives of lying. Aguirre did say that she had asked Armenia for the phone number of a former supervisor.⁸ Ruppert argued that Aguirre was performing her duties as a union steward in assisting Arse with the unemployment matter. Aguirre, however, disagreed with Ruppert, and maintained that she had been attempting to assist Arse only as a friend and not as union steward. Ruppert asserted that Back was discharging Aguirre because of her union activities, and again Aguirre shook her head and said, "No, I just wanted to support my friend."

Back testified that as Aguirre merely denied the conversations and offered no credible response to the accusations, or any witnesses, or any excuse or explanation warranting a lesser degree of discipline, there was simply no reason to defer the termination and continue the investigation. She handed Aguirre her final paycheck and

⁵ I discredit Union Representative Ruppert's testimony to the contrary.

⁶ Back, who convincingly attested to her high regard for and insistence upon honesty by and between her, her HR staff, and other employees, was a particularly forthright witness, and I have no reservations about crediting her testimony in its entirety. I do not credit the testimony of Aguirre or Ruppert to the extent that their testimony differs from that of Back.

⁷ Back testified that Aguirre would have been terminated a week earlier had she appeared at work on October 6, as scheduled.

⁸ This particular conversation, according to Armenia's testimony, which I credit, had occurred several weeks prior to the September 23 conversations. Aguirre testified that in attempting to assist Arse with her unemployment claim, she had asked Armenia for the phone number of Olga, a former supervisor. Olga spoke Spanish and had been helpful in assisting Aguirre speak with Arse, who apparently was not fluent in English.

terminated her. The paycheck had been prepared in advance in conformity with State law that requires final payment at the time of termination.⁹

5 Back testified that although she had had grievance and related discussions with other union stewards, she had never had any prior meetings or interaction with Aguirre other than their mutual attendance at bargaining sessions. Back specifically denied that the discharge of Aguirre was motivated by Aguirre's conduct in her capacity as a union steward or union advocate.

10 There is no showing that the Respondent has terminated or otherwise discriminated against any other union stewards or union advocates for engaging in activities on behalf of the Union.

15 Assuming *arguendo* that the General Counsel has established a *prima facie* case under *Wright Line*,¹⁰ I find the Respondent has met its *Wright Line* burden of proof by demonstrating that Aguirre would have been discharged under the circumstances herein regardless of any animosity harbored by the Respondent against Aguirre or the Union for engaging in concerted protected or union activity.

20 On the basis of the foregoing, I shall recommend that the complaint be dismissed in its entirety.

Conclusions of Law

25 1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act, and a health care institution within the meaning of Section 2(14) of the Act.

30 2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent has not violated the Act as alleged in the complaint.

On these findings of fact and conclusions of law, I issue the following recommended:

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ORDER¹¹

The complaint is dismissed in its entirety.

Dated: Washington, D.C. July 26, 2012

GERALD A. WACKNOV

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Gerald A. Wacknov
Administrative Law Judge

⁹ During a subsequent conversation in the cafeteria that same day, Aguirre again said to Back that the HR representatives were lying, and added that Back, too, was lying.

¹⁰ *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st. Cir. 1981), *cert. denied* 455 U.S. 989 (1982).

¹¹ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.